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No. 668

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

DONALD J. GARRISON and CLOVIS N. OOLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully pray this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered October 31, 1961, wherein an order of the United States District Court for the Eastern District of Wisconsin denying these petitioners a new trial on the grounds of newly discovered evidence was affirmed. Petitioners stand convicted for violation of Sections 371 and 1341 of Title 18, U. S. C., respectively.

(a) THE OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been officially reported. A copy thereof is hereto annexed. See pp. 19 to 28, infra, of the Appendix to this petition. The District Court wrote a Decision and Order from which the appeal was taken. This appears in Appellants' Appendix filed in the Court of Appeals, pp. 30-35.

(b) STATEMENT OF GROUNDS OF JURISDICTION.

(i) The judgment of the Court of Appeals was rendered and entered on October 31, 1961.

(ii) Petition for rehearing was duly filed in the Court of Appeals which was denied, said order denying a rehearing having been entered on December 18, 1961. There has been no order granting an extension of time in which to file this petition.

(iii) The jurisdiction of this Court is invoked pursuant to Section 1254, Title 28, U. S. C., 62 Stat. 928; and Rule 37 (c), Title 18, U. S. C.

(c) QUESTIONS PRESENTED FOR REVIEW.

Can the conviction of these petitioners stand when it is subsequently shown at another trial of petitioners in a different jurisdiction that a material witness testifying to the same subject matter for the government committed perjury at the first trial, which, if provable at the time of said first trial, would have greatly discredited her testimony; and without whose testimony petitioners might well have been acquitted?

Petitioners were convicted below on a charge of conspiracy to violate the mail fraud statute, Section 1341, Title 18, U. S. C., and of devising a scheme to defraud and using the mails in furtherance thereof. Following the affirmance of the judgment of conviction, petitioners were tried in the Eastern District of Missouri in October 1960 on an indictment containing charges of violating the mail fraud statute, Section 1341, Title 18, U. S. C., at which time a mistrial was declared by virtue of the testimony of the same witness concerning the same subject matter of her testimony at petitioners' trial in the Eastern District of Wisconsin.

Have petitioners been denied a fair and impartial trial, when the record pertaining to their conviction establishes a material government witness testified falsely at their trial?

(d) RULE RELIED ON.

Rule 33, Title 18, U. S. C.

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

(e) STATEMENT OF THE CASE.

Petitioners were indicted in the Eastern District of Wisconsin in 1958 charged with a conspiracy to violate Section 1341, Title 18 U. S. C., and in ten counts they were charged with violation of Section 1341, Title 18 U. S. C. At their trial in Milwaukee, Wisconsin in February 1959 one Billie Ann Snelson was a principal and material witness for the government. She had been an office employee of the petitioners, who operated a vending machine distributing company named Bell Merchandising Automatically, Inc. She testified to various matters that had to do with the operation of petitioners' business. She wrote the sales confirmation letters; that the company did not have a factory and did not manufacture their own vending machines; that she had typed out the sales talk used by

petitioners. She also testified that before being employed by petitioners in 1956 she had worked for Silver King Distributing Company at which place petitioners had also worked as salesmen before starting up their own company, Bell Merchandisting Automatically, Inc. In the course of her testimony she was asked about some of the practices at Silver King Distributing Company, and particularly if Silver King Distributing Company had a sales talk (pitch).

In her direct testimony at Milwaukee, Wisconsin, she stated she knew what a pitch was—a sales talk, and while employed at Bell Merchandising Automatically she had something to do with the pitch. She typed up a pitch one time. As she remembered, the length of it was between six and ten pages. After she typed up the pitch, it was discussed a lot to see how it was going to be told, and it was put on a tape recorder to see how it sounded when played back (App. 4).

The transcript of her testimony at Milwaukee, Wisconsin, on cross-examination, showed the following:

> "Before going to work for Bell Merchandising she worked at Silver King Distributing Company on Olive. She worked there maybe three months. **The Silver King Distributing Company had same kind of a machine that Bell Merchandising did. Mr. Ooley and Garrison worked for Silver King as salesmen. At Silver King she had the same kind of a job as she did later on at Bell.** She was secretary or office girl in both places. She remembered putting (App. 4) pictures in a book, one a page that gave a breakdown if they sold one, two, three, four or five blades a day out of each machine. The defendants used a brochure at Silver King too, to demonstrate what they had to sell as part of the sales talk and the one used at Bell was just about the same as the one used at Silver

King. She remembered putting the page in the book and that gave a breakdown if they sold one, two, three or four or five blades a day out of each machine for Silver King, but did not remember putting one in for Bell.

Q. Now all this stuff is very similar to the same way in which Silver King operated their business; is not that right?

A. Yes, sir.

Q. And who was it you worked for at Silver King?

A. Pete Krane.

Q. Anybody else?

A. Yes, I worked under one of the others—I was working for one of the others at all times.

Q. Was it their company, those two that had—

A. I don't know Jack DeWees.

Q. Were they your bosses?

A. Yes.

Q. And Silver King was a corporation, wasn't it? It was Silver King Distributing Company, Inc., wasn't it?

A. I don't remember.

Q. All right. Now, in so far as the Defendants' Exhibit 57 is concerned, when Mr. Garrison or Mr. Ooley were salesmen for Silver King Distributing Company, did they have one of these sales kits—or whatever they call them—or sales brochures?

A. When they were working for Silver King?

Q. That's right.

A. Yes (App. 5).

Q. And when they started for themselves it was substantially the same type of sales material, sales kit; isn't that right?

A. Yes.

Q. **Now, in so far as the pitch or sales talk, when they were working for Silver King they had a sales**

pitch or sales talk that was given to them by the owners of Silver King; isn't that right?

A. No, sir.

Q. You say they were not given a sales pitch, or that you don't know about it?

A. I have never known a salesman to get a sales pitch from Silver King.

Q. I see.

A. They—I——

Q. Did the salesmen have a sales pitch there at Silver King?

A. I was told they did.

Q. You were told they did. I see. But you did not prepare it?

A. No, I did not.

Q. They had it, but you did not prepare it?

A. No.

Q. And I believe you testified that there was a sales pitch prepared at Bell Merchandising when they went into business?

A. Yes, sir.

Q. And did that deal with the selling of razor blades?

A. Yes, sir.

Q. And with the selling of razor blade machines?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. Do you know of anything that Mr.—strike that. Do you know of anything that Mr. Garrison or Mr. (App. 6) Ooley put in that sales pitch which was not the same or similar to the sales pitch that was used at Silver King?

Mr. Corry: Your Honor, I object. She hasn't testified she knew anything about a sales pitch at Silver King.

The Court: **Sustained. The matter of what the sales pitch was, if any, at Silver King is not before the Court and jury'** " (App. 7).

The petitioners had, in fact, as later shown by her testimony at St. Louis, Missouri, been furnished a sales talk when they worked for Silver King Distributing Company, and she had typed it, although as shown by the foregoing testimony, she stated she had not prepared it nor did she know a salesman to get a sales pitch from Silver King. The trial at St. Louis involved the operations of Silver King Distributing Company, and these petitioners as salesmen selling the same kind of vending machines for Gillette razor blades.

At the trial of petitioners in the United States District Court, Eastern District of Missouri, together with six other defendants, the government called the same Billie Ann Snelson as a material witness to testify that while she was employed at Silver King Distributing Company in 1956 she had typed up six copies of a sales talk (pitch) **and that each of the petitioners was given** one. She identified the original sales pitch, Government's Exhibit 209, from which she had made the copies.

Her direct examination in that regard was as follows:

" 'Q. Do you recall who hired you?

A. Jack DeWees hired me.

Q. Do you recall who the officers were of the company?

A. Peter Krane was the owner and Jack DeWees was the office manager.'

She was employed as a secretary. She had seen Government's Exhibit 209 and the first time was when Mr. Krane gave it to her to type up six copies of it.

'Q. Did you type six copies of this?

A. Yes, sir.

Q. What did you do with the six copies that you typed?

A. I gave Mr. Krane one, Jack DeWees one, **Mr. Ooley one and Mr. Garrison one** and Mr. Krane took the other two (App. 7).

Q. **Do you see Mr. Jack DeWees in the Court room?**

A. **Yes, sir.**

Q. Now, will you examine this exhibit and point out to us what changes, if any, you made in the copy that you made of that exhibit?

A. It says here, I am an original director with Automatic Sales Company, Incorporated. That was changed to Silver King Distributing Company.

By the Court: Did you make a true and accurate copy of what is in 209 in making the six copies you testified about?

A. Other than the changes in names, yes.

By Mr. Martin, Asst. District Attorney.

Q. Were you given any directions as to how to type the six copies you made?

A. I was to give one to each salesman and two to Mr. Krane.

The Court: The record may now show that Exhibit Number 209 is and will be received in evidence." (App. 8).

Government's Exhibit 209, a seventeen page document (sales pitch), was read to the St. Louis, Missouri, jury.

The witness, Billie Ann Snelson, resumed her testimony at the St. Louis, Missouri trial on October 10, 1960, and on cross-examination the following occurred:

"'Q. By Mr. Shenker: Miss Snelson, you testified or did you testify in the United States District Court for the Eastern District of Wisconsin in the City of Wisconsin (Milwaukee) on or about February 16, 1959.' Objections and colloquy followed.

'(The Court): Do you understand the question now? Did you testify in the United States District Court on or about February 16, 1959 in the Eastern District of Wisconsin, in Milwaukee. You can answer that yes or no.

The Witness: Did I testify?

The Court: Yes.

A. (By the Witness)

Q. (By Mr. Shenker) You did testify and in testifying there you were asked questions pertaining to a sales pitch, is that correct, sales talk or sales pitch?

A. Yes, I was asked questions' " (App. 9).

Reading from the Milwaukee, Wisconsin, transcript of the trial proceedings, the following occurred:

" 'Q. All right. Then I will ask you to please state if this question was asked of you to which you gave that answer: "No, insofar as the sales pitch or sales talk when they were working for Silver King, they had a sales pitch, a sales talk that was given them by the owner of Silver King, isn't that right." Answer: "No, sir" (App. 9).

A. No, I don't remember that question' (App. 10).

. . . . . .

'Q. All right. Now you testified here that you had nothing to do with the preparation of a sales pitch at Bell Merchandising, is that right?

A. That is right' (App. 12).

. . . . . .

'Q. (By Mr. Shenker) Mrs. Snelson, I will ask you if it isn't a fact that you testified at the same time on February 16, 1959, in the United States District Court in Milwaukee, Wisconsin, to the following question: "Was it their company those two that had—" Answer: "I don't know Jack DeWees." Do you recall that question being asked of you and your giving that answer?

A. That I didn't know Jack DeWees?

Q. Do you recall that answer?

A. No, I do not' (App. 13).

* * * * * * *

'Q. Mrs. Snelson, on these questions that I asked you on some of which you stated you remember and some of which you stated you did not remember, you knew that the questions pertained to Silver King, did you not?

A. Those are from Bell Merchandising when I was in Milwaukee, it was against Bell Merchandising Company.

Q. All right. But the questions that were asked of you, you knew pertained to Silver King, did you not?

A. No, I didn't. I thought you meant from that what I was asked in there.

Q. All right. Now when the question was asked of you did the salesmen have a sales pitch there at Silver King and you answered, "I was told they did," did you know we were talking about Silver King?

A. No, I didn't.

Q. And the question when you were asked, "You were told they did. I see. But you did not prepare it?" and you said, "No, I did not." Did you know they were talking about Silver King?

A. No.

Q. **When you were asked, "They had it, but you did not prepare it." Answer: "No." Did you know that you were talking about Silver King?**

A. **I still thought it was about Bell Merchandising.**

Q. You still thought it was about Bell Merchandising? And when the question was asked of you, "I have never known the salesmen"—strike that. When the question was asked of you, **"Now, insofar as the (App. 14) pitch, the sales talk, when they were working for Silver King they had a sales pitch or**

sales talk that was given to them by the owners of Silver King, isn't that right?" Answer: "No, sir." Did you know that that referred to Silver King?

. . . . . .

A. I thought all of these questions concerned Bell Merchandising. I thought you wanted me to explain exactly what I did.

The Court: The questions themselves refer to Silver King.

The Witness: I mean about Bell Merchandising.

The Court: Will you be quiet, ma'am? He is asking you whether or not when these questions were asked which refer to Silver King, whether you knew at that time that your answers were with reference to Silver King?

A. No, I didn't.

Q. **(By Mr. Shenker) Following that, the next question, "You say they were not given a sales pitch, or you don't know about it?" Answer: "I have never known a salesman to get a sales pitch from Silver King." Now did you know at that time that you were talking about Silver King?**

A. **No.**

(Thereupon the following occurred at the Bench out of the hearing of the jury:)

Mr. Shenker: The next question shows right away that she says that it was a sales pitch at Bell Merchandising. It just follows that right up. She had to know we were talking about Silver King (App. 15).

The Court: We will take a recess for a few minutes.

. . . . . .

The Court: The questions that Mr. Shenker was referring to her on page 622 is in the middle of the page, "And I believe you testified that there was a sales pitch prepared at Bell Merchandising when they

went into business." Answer: "Yes, sir." Question: "And did that deal with the selling of razor blades?" Answer: "Yes, sir." Which question and answer if she gave that testimony shows, that she did know that it was—in other words, these questions which she answered here were about one company. She testified now that she didn't know that those questions were being asked about Silver King but these questions show they were being asked about Silver King.

Mr. Shenker: And she used the words Silver King herself.

The Court: **And the transcript down here at the bottom of page 621, her answer, "I have never known a salesman to get a sales pitch from Silver King." Then they come down here and ask about Bell Merchandising.**

Now this witness has deliberately lied one way or another on the stand. She has testified here that she made Exhibit 209 when she was working for Silver King. Now she gave testimony in Wisconsin that they did not have a sales pitch and she did not prepare a sales pitch when she worked for Silver King. Then she was asked if she did not realize that those questions were being asked about Silver King and she says no, they were being asked about Bell Merchandising, and in the answer which she previously gave she referred to Silver King" (App. 16).

* * * * * * *

"The Court: The record may show the Court is sustaining defendants' motion for mistrial" (App. 19).

On retrial of all defendants at St. Louis, Missouri, all eight defendants were acquitted, and the government in its five weeks trial did not call Billie Ann Snelson as a witness. With this Honorable Court's permission, petitioners would seek to have the record of the judgment of acquittal and the certificate of the Court Reporter at peti-

tioners' second trial at St. Louis, Missouri, ending September 15, 1961, to the effect the said Billie Ann Snelson was not called as a witness, made a part of the record for consideration by this Honorable Court.

(f) JURISDICTION OF THE COURTS BELOW.

The United States District Court had jurisdiction under 18 U. S. C., Section 3231, 62 Stat. 826. The Court of Appeals had jurisdiction under 28 U. S. C., Section 1291, 65 Stat. 726.

(g) REASONS FOR GRANTING THE WRIT.

The indictment in this case contained eleven counts, the first count of which charged the defendants with a conspiracy to violate Section 1341, Title 18 U. S. C., and the remaining ten counts with violation of Section 1341, Title 18 U. S. C., wherein they were charged with a scheme to defraud and the use of the mails in furtherance thereof. The basic element of the alleged scheme to defraud was the organization of Bell Merchandising Automatically, Inc., and the alleged false representations by petitioners in obtaining contracts for the purchase of Gillette Razor Blade Vending Machines from purchasers in the Milwaukee, Wisconsin area.

The indictment returned against these petitioners and six other defendants in The United States District Court at St. Louis, Missouri, charged them with a scheme to defraud and the use of the mails to defraud. Likewise, part of the basic elements of the alleged scheme to defraud amongst others was the organization of Silver King Distributing Company, and the alleged false representations by petitioners in obtaining contracts for the purchase of Gillette Razor Blade Vending Machines from purchasers in different parts of the United States. It was urged by petitioners in the Court of Appeals that the trial court committed error in denying petitioners' motion for

a new trial on the grounds of newly discovered evidence for the reason the testimony of a material witness, and one of the principal witnesses for the government, was false and perjured. Petitioners also urged that a new trial should have been granted them when it was shown the witness gave false and perjured testimony, and without which testimony it was probable the jury would or might have reached a different verdict. Petitioners likewise urged that they should be granted a new trial on grounds of newly discovered evidence when proof of the newly discovered evidence was established after trial on which appellants were convicted and not provable beforehand. It was also urged that the trial court had abused its discretion in denying petitioners' motion for a new trial on grounds of newly discovered evidence when that Court indulged in hypothetical interpretation of evidence given in two different jurisdictions on the same subject matter in order to make it consistent with testimony it was intended to rebut and refute.

The Court of Appeals, in affirming the order of the District Court denying petitioners a new trial, rendered an opinion which was in conflict with earlier decisions of The Supreme Court of the United States. **Mesarosh et al. v. U. S.**, 352 U. S. 1, 77 Sup. Ct. 1; **Kretske, Petitioner, v. U. S.**, 350 U. S. 807, 76 Sup. Ct. 51. Likewise, did the Court of Appeals in affirming said District Court's order create a conflict with decisions of another Court of Appeals in another circuit. **Hamilton v. United States**, 140 Fed. 2d 679, 681, D. C.; **Arbuckle v. United States**, 146 Fed. 2d 657, D. C.

The applicability of Rule 33, Title 18, Federal Rules of Criminal Procedure, providing for a new trial on grounds of newly discovered evidence predicated upon perjury by a government witness in testifying on the same subject matter in two different trials and jurisdictions creates an important question and should be fully determined, when

there is a reasonable possibility there has been a miscarriage of justice.

The Court of Appeals failed to rule if the testimony of the government's witness, Snelson, wherein the government in both trials vouched for her credibility, was false and perjurious; as did the United States District Judge in denying petitioners' motion for a new trial on grounds of newly discovered evidence, which ruling was sanctioned by the Court of Appeals as to call for the exercise of this Honorable Court's power of supervision.

The testimony of the witness Snelson at petitioners' trial at Milwaukee consisted of 128 pages of the typewritten transcript and covered more than twice as many pages as that of any other government witness (App. 23). The cumulative effect of her testimony was needed and desired to prove the alleged scheme to defraud, and to contradict petitioners' testimony on material points, as well as to prove the use of the mails in the execution and furtherance of such alleged scheme, without which the government would have had a weak case, and without whose testimony, the jury might well have returned a verdict of not guilty.

This Honorable Court has expressed itself very pointedly on the question of tainted testimony in **Mesarosh v. United States**, 352 U. S. 1, 77 Sup. Ct. 1. Certiorari was granted, 350 U. S. 922, 76 S. Ct. 218. Although the question of the false and perjurious testimony of the witness Mazzei did not come before this Honorable Court based on a motion for a new trial on ground of newly discovered evidence, nevertheless, the record showed the Solicitor General confessed error and moved to remand the case for further proceedings before the District Court to determine the truthfulness of Mazzei's testimony. However, this Court reversed the case for a new trial, stating:

> "Commendable as the action of the Solicitor General was in promptly bringing the matter to our

attention when it came to the attention of his office, we do not believe the disposition of the case suggested by him should be made.

Either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. **The dignity of the United States Government will not permit the conviction of any person on tainted testimony.** This conviction is tainted and there can be no other just result than to accord petitioners a new trial. * * * Here, on the other hand, in a criminal case, the original finder of fact was a jury. The District Judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. **Only the jury can determine what it would do on a different body of evidence,** and the jury can no longer act in this case." (Emphasis supplied.)"

In **Kretske, Petitioner, v. U. S.,** 350 U. S. 807, 76 S. Ct. 51, reversed and remanded to the District Court for a new trial, the defendant there was charged with receiving, concealing and storing certain goods, wares and merchandise of the value of more than $5,000.00, which were part of and constituting interstate commerce, knowing the same to have been stolen. The value of the paintings stolen was an important and jurisdictional question. A government witness, Lafitte, testified as to the value of the paintings. On their motion for a new trial appellants claimed that

newly discovered evidence would disclose that Lafitte testified falsely and that the prosecuting officers knew or should have known of such perjury.

These two prosecutions of petitioners being Post Office Department cases, it certainly is justified in inferring that the Post Office Inspectors who prepared the cases for the government knew what Billie Ann Snelson's testimony was and would be on the subject matter concerning the sales talk.

In the Arbuckle case, **Arbuckle v. United States**, 146 Fed. 2nd 657 (D. C.), a new trial was granted on grounds of newly discovered evidence when it was established after trial and conviction of the defendant that the testimony of a witness for the government was false. The defendant was prosecuted on a charge of embezzlement. The testimony of the Assistant Manager of the Senate Restaurant was to the effect the defendant had not turned over to him a certain check, although the defendant testified he had. The new evidence established that the check with the Assistant Manager's endorsement had been deposited in the Senate Restaurant's account.

In **Hamilton v. United States**, 140 Fed. 2d 679, 681 (D. C.), the defendant was convicted on a charge of soliciting, based upon the testimony of a police officer. In support of her motion for a new trial on the ground of newly discovered evidence, defendant filed affidavits of two women contradicting the police officer's testimony. These witnesses were not available at trial. The District trial court refused to consider those affidavits and denied the motion as being insufficient to establish newly discovered evidence.

The Court of Appeals said in part:

> "This does not seem to us a correct evaluation of the statement of Thelma Matthews as new evidence. It involves the assumption that she had considered

and deliberately omitted to deny in detail the testimony of the arresting officer. On the basis of that assumption the trial court concluded that the affidavit 'could' be consistent with the arresting officer's testimony. Such a construction of Thelma Matthews' statement seems so narrow that it can hardly be justified without giving the witness a chance to explain the possible ambiguities in her affidavit. The construction appears more improbable when read in connection with the affidavit of the other proposed witness, Marie Belt, which directly contradicts the officer's story and confirms what seems to us the natural interpretation of the statement of Thelma Matthews."

It is urged that the principle involved in the Arbuckle and Hamilton cases, supra; on the question of false testimony and newly discovered evidence adduced to establish that fact, establishes a conflict, such as to require this Court to resolve the question.

CONCLUSION.

In view of the foregoing, petitioners ask that the Court issue its Writ of Certiorari to review the judgment of the Court of Appeals affirming the order of the District Court denying these petitioners a new trial.

Respectfully submitted.

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APPENDIX.

OPINION OF COURT OF APPEALS

United States Court of Appeals
For the Seventh Circuit.

In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1961—September Session, 1961

No. 13321

United States of America,
Plaintiff-Appellee,
v.
Donald J. Garrison,
Defendant-Appellant.

No. 13322

United States of America,
Plaintiff-Appellee,
v.
Clovis N. Ooley,
Defendant-Appellant.

Appeal from Order Denying Defendants - Appellants' Motion for New Trial, from the United States District Court for the Eastern District of Wisconsin.

October 31, 1961

Before Knoch and Castle, Circuit Judges, and Mercer, District Judge.

Knoch, Circuit Judge. Donald J. Garrison and Clovis N. Ooley, the two defendants-appellants in these cases, were both named in an eleven-count indictment, issued on August 11, 1958, by the Grand Jury for the Eastern District of Wisconsin. The indictment charged Mr. Garrison and Mr. Ooley with conspiracy and mail fraud. They were found guilty. This Court's opinion affirming the judgments of the Trial Court is reported in 280 F. 2d 493, where the facts of the case are discussed in detail.[1]

[1] Chief Judge Hastings speaking for this Court stated:

"The evidence in the record establishes the following course of events. Defendants had worked as salesmen for several months prior to March, 1956, for Silver King Distributing Corporation in St. Louis, Missouri, where they sold vending machines for the automatic vending of Gillette Blue Blades (safety razor blades). They determined to go into business for themselves.

"About March 26, 1956, at St. Louis, Missouri, defendants obtained from the United States Post Office Department a mailing permit for a corporation to be known as Bell Merchandising Automatically, Inc.

"On April 2, 1956, defendants caused to be formed a Missouri corporation under the name of Bell Merchandising Automatically, Inc., 1183 Hodiamont Avenue, St. Louis, Missouri. Defendants were named as the principal officers of the corporation, Garrison acting as president and Ooley as vice-president. Each owned 49 shares of stock, with the remaining two shares owned by their respective wives. The primary purpose of the corporation was to deal in automatic vending machines and merchandise to be sold therefrom.

"About the first of April, 1956, defendants caused advertisements to be placed in four newspapers published in the Eastern District of Wisconsin, all of which newspapers circulated through the United States mail. These newspapers were the Milwaukee Sentinel, Cudahy Reminder Enterprise, Fond du Lac Commonwealth Reporter and Appleton Post Crescent. Typical of such advertisement was the following:

"INCREASE YOUR INCOME —
"Part or Full Time
"DISPENSING WORLD FAMOUS 'GILLETTE' BLUE BLADES

"Reliable man or woman will be selected for this area to handle the world famous 'Gillette' blue blades through our new modern type merchandising dispensers. An unusual opportunity to

At the trial in the District Court in Milwaukee, Wisconsin, the government's witness Billie Ann Snelson testified as follows:

> secure your future. Will not interfere with your present employment. To qualify you must have . . .
>
> * $1,498.50 CASH AVAILABLE IMMEDIATELY FOR INVENTORY
> * 2 REFERENCES AND SERVICEABLE CAR
> * 5 SPARE HOURS WEEKLY
> * MUST BE ABLE TO START AT ONCE
>
> This company will supervise your operations and extend financial assistance to full time if desired. This excellent opportunity is offered to a dependable person who is interested in their future. It's an all cash business, depression proof, no credit risk. Do not answer unless fully qualified for the necessary time and investment.
>
> INCOME STARTS IMMEDIATELY. NO SELLING OR SOLICITING. BUSINESS IS SET UP FOR YOU. COMPANY SECURES ALL LOCATIONS.
>
> For personal interview Write Box M 37"

Within a few days after the publication of these advertisements, and in answer thereto, the ten persons alleged to have been defrauded responded by letter to the post office box listed. Almost immediately thereafter five of them were personally contacted by defendant Garrison, four by defendant Ooley and one by both of them. (These ten persons all testified for the Government.) Each read the advertisement and responded by mail. Each testified that when visited by one of the defendants, oral representations were made. From the sales talk given by defendants, the following general pattern of representations was made:

That Bell Merchandising Automatically, Inc., was a well-established firm and had been in business for a long time. That it had been approved by one or more of the following: St. Louis Better Business Bureau; St. Louis Chamber of Commerce, Milwaukee Better Business Bureau, Milwaukee Chamber of Commerce, Cudahy Chamber of Commerce, Fond du Lac Chamber of Commerce and the Appleton Chamber of Commerce. (This was false. The company had just started in business, and it was stipulated that none of these organizations endorsed or approved any business.)

That the company was listed in Dun and Bradstreet under the name of "Bell M.A." with a B-1 rating, indicating an annual income of $200,000. One person was told that the company had the financial standing of AT&T and another that its rating was as high as General Motors and the Bell Telephone Company. (This was false. Another business concern, well known in St. Louis as

Q. And who was it that you worked for at Silver King?

A. Pete Krane.

"Bell M.A. Co." was listed in Dun and Bradstreet with a B 1 rating.)

That the company was controlled or financially backed by the Gillette Company and had the exclusive franchise to manufacture and distribute the dispensing machines or the exclusive right to dispense Gillette blades in vending machines, or that "you can't go wrong with a company like Gillette behind you." (This was false.)

That the prospect would be given a large, exclusive territory such as the entire city of Milwaukee or half the city of Milwaukee or similarly large territory. That the vending machines would be placed for them by a location engineer in hotels, motels, factories, well known chain drug stores and supermarkets and similar establishments. (This was false.)

That they would earn a substantial amount, ranging from $23.10 per week to $390 per month; that if sales did not exceed a varying minimum amount or earnings did not meet the estimates, the company would relocate the machines in more favorable locations; that the machines were being sold to them at cost; and that any time they wanted to quit business, the company would repurchase the machines at a price of 5 to 10% below cost. (This was false. These promises did not materialize.)

There were other oral misrepresentations made to the ten victims by defendants during the course of their sales talk following the same general pattern as above set out. We need not further burden this opinion with them.

Each of the ten persons alleged to have been defrauded testified that based upon these representations made by defendants, he entered into a written contract in which he agreed to purchase thirty vending machines at $49.95 each and 400 packages of Gillette Blue Blades at 34 cents each, making a total contract price of $1,634.50. Each further testified that upon signing the contract and paying at least a part of the contract price, he received a letter sent through the United States mail confirming the contract and acknowledging the payment made. Such letters were signed by "Jack Sullivan, Mgr." In most instances the balance of the contract price was paid after receipt of this letter.

It was abundantly shown that the invitation to participate in this enterprise was extended through the newspaper advertisements. The initial response was by letter sent through the mail to the post office box indicated, and the final confirmation was made by defendants by letter duly mailed.

An office employee of defendants [Billie Ann Snelson] testified that during April, 1956 she wrote the sale confirmation letters in question and was instructed by defendants to sign the fictitious

Q. Anybody else?

A. Yes, I worked under one of [sic] the other—I was working for one of [sic] the other at all times.

Q. Was it their company, those two that had——

A. I don't know Jack DeWees.

Q. Were they your bosses?

A. Yes. * * *

Q. I see. Now, I am not certain whether this question was asked of you, Mrs. Snelson, but were there other salesmen working for Silver King at the time that you were working there and Mr. Ooley and Mr. Garrison were working there?

A. As far as—at Silver King?

Q. Yes, ma'am.

A. As far as I can remember, it was Mr. Garrison, Mr. Ooley, Pete Krane, and Jack DeWees.

Q. Now, insofar as the pitch or sales talk, when they were working for Silver King they had a sales pitch or sales talk that was given to them by the owners of Silver King; isn't that right?

A. No, sir.

Q. You say they were not given a sales pitch, or that you don't know about it?

A. I have never known a salesman to get a sales pitch from Silver King.

Q. I see.

A. They—I——

Q. Did the salesmen have a sales pitch there at Silver King?

---

name of "Jack Sullivan." She further testified that defendants instructed her to respond to any telephone calls for Jack Sullivan that he was out of the office and could not be reached; that Bell Merchandising Automatically, Inc. did not have a factory (as set forth in the purchase order contract); and that defendants did not manufacture their own vending machines. She further testified that she typed out the sales talk used by defendants; that this was placed on a tape recorder and was discussed by defendants; and that it had to do with the selling of the vending machines and razor blades. She did work in preparation of sales materials.

A. I was told they did.

Q. You were told they did. I see. But you did not prepare it?

A. No, I did not.

Q. They had it, but you did not prepare it?

A. No. * * *

Donald Garrison testified as follows during the trial at Milwaukee, Wisconsin:

Q. Before that were you working anywhere?

A. Yes, for the Silver King Distributing Corporation on Olive Street.

Q. Is that in St. Louis?

A. Yes, sir.

Q. What is the business of the Silver King Company?

A. Sells razor blade machines.

Q. Are they the same kind of a blade machine you see there, Exhibit 8?

A. Yes, sir, they are.

Q. How long had you worked for them?

A. Approximately four to five months.

Q. What did you do; in other words, tell us this: When you went to work there what were the circumstances under which you did go to work there?

A. Well, I knew Mr. DeWees, one of the owners of Silver King Distributing Corporation, and he came over and talked to me and told me—for me to come over and talk to his partner, Mr. Krane. And I went over and talked to Mr. Krane, and they explained it to me and showed me the literature and all the brochures that they had in regards to the business. I told them I would think it over and let them know in a few days. Well, I went home and gave it considerable thought, and became sold on the idea myself, and I went back and Mr. DeWees took me out and explained the whole sales presentation to me. * * *

Clovis N. Ooley testified as follows during the trial at Milwaukee, Wisconsin:

Q. Now, did you have a sales pitch?

A. Yes, we did have.

Q. What did that consist of, if you please?

A. Well, it was just a sales talk, a presentation that we learned from Mr. DeWees over at the Silver King Distributing Company, and Billie typed it up for us and we read it over and we studied it, but then we presented it in our own words.

Q. I see. And did you ever have occasion to rehearse it, as they say, in the offices of your company?

A. Oh, yes, we did do that.

Q. Did you do it in the presence of other people?

A. Yes, in the presence of whoever might be around, like Mr. Garrison; he and I would rehearse it together. • • •

Q. Now, Mr. Ooley, I believe that you worked for Mr. DeWees?

A. Yes, sir.

Q. And where was that at?

A. At the Silver King Distributing Company in St. Louis.

Q. And after you worked there you started your own corporation; is that right?

A. Yes, sir.

Q. Mr. Ooley, you testified, I believe on direct examination, that Mrs. Snelson typed up the sales pitch?

A. Yes, she did. • • •

Both Mr. Garrison and Mr. Ooley were later tried in the District Court for the Eastern District of Missouri on other charges of devising a similar scheme to defraud and of using the mails in furtherance of that scheme. Mrs. Snelson was again called as a witness for the government in the Missouri case. In the Missouri trial she testified that while employed at Silver King Distributing Company,

she had typed several copies of a sales pitch and had given these copies to Silver King salesmen. She also testified that she did know Mr. Jack DeWees. The Trial Judge in the Missouri case declared a mistrial on the ground that Mrs. Snelson had given conflicting evidence with respect to these items, and that her evidence in the Wisconsin trial or the Missouri trial had to be wrong or false. The Trial Judge in Missouri indicated that this apparent discrepancy could perhaps be explained,[2] but that the sales pitch was already in evidence as an exhibit, that he could not see how reception of that exhibit could be cured, and that he had, therefore, sustained the defendants' motion for mistrial.

Mr. Garrison and Mr. Oxley then moved for a new trial on the Wisconsin case on the ground of newly discovered evidence that the testimony of a material witness for the government had been false or perjured. It was their position that Mrs. Snelson's testimony was vital to the government's case to substantiate the charge of use of the mails and the existence of a scheme to defraud. They rely heavily on the fact that in a third trial in Missouri (after the mistrial), when Mrs. Snelson was not a witness, both of them were acquitted.

At the trial in Wisconsin, defendants sought to prove that their activities in their own company, Bell Merchandising Automatically, Inc., were in part modeled on the practices they had learned at Silver King, which they had believed to be proper procedures.

The motion for a new trial in the Wisconsin case was denied, and this appeal followed.

The appellants contend that the Trial Judge abused his discretion in overruling their motion for a new trial in

[2] Counsel for the government do suggest a plausible explanation, but we do not reach that question because of the basis on which this appeal is decided.

the Wisconsin case. A motion of this nature is addressed to the sound discretion of the Trial Court, **U. S. v. On Lee**, 2 Cir., 1953, 201 F. 2d 722, cert. den. 345 U. S. 936. It should be granted with caution. **U. S. v. De Marie**, 7 Cir., 1958, 261 F. 2d 477, 479. In deciding a motion of this nature, the Trial Judge may take into consideration such knowledge as he gained while presiding over the trial. **U. S. v. On Lee**, supra; **U. S. v. Marachowsky**, 7 Cir., 1954, 213 F. 2d 235, cert. den. 348 U. S. 826.

The Trial Judge, in ruling on this motion for a new trial in the Wisconsin case, noted (1) that Mrs. Snelson's statement, in the Wisconsin trial, that she did not know Jack De Wees, was given as an unresponsive answer to an incomplete question, and that her later testimony showed that she did know Jack De Wees; and (2) while Mrs. Snelson said she did not prepare a sales pitch at Silver King, and had never known a salesman to get a sales pitch there, she also testified that she was told that the Silver King salesmen did have a sales pitch.

Assuming that Mrs. Snelson's statement in the Wisconsin trial that she did not type a sales pitch at Silver King, was directly contradicted by her testimony in the Missouri trial, and that it was, in fact, a false statement, the Trial Judge found it insufficient to justify granting a new trial. He concluded that the allegedly false testimony concerned minor details not material to the guilt of the defendants. To justify a new trial, evidence described as newly discovered must also be material to the issues involved. **Pitts v. U. S.**, 9 Cir., 1959, 263 F. 2d 808, cert. den. 360 U. S. 919.

We cannot consider the action of the District Court, in denying this motion for a new trial, as manifesting an abuse of discretion.

We have considered all arguments raised by appellants, but do not deem it necessary to comment on each as they

do not alter our opinion that the order of the District Court must be affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment

United States Court of Appeals
For the Seventh Circuit.
Chicago 10, Illinois
Tuesday, October 31, 1967

Before

Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge.

United States of America, Plaintiff-Appellee, No. 13321 vs. Donald J. Garrison, Defendant-Appellant;	Appeals from order denying Defendants - Appellants' Motion for New Trial from the United States District Court for the Eastern District of Wisconsin.
United States of America, Plaintiff-Appellee, No. 13322 vs. Clovis N. Ooley, Defendant-Appellant.	

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

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628151—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 668

DONALD J. GARRISON AND CLOVIS N. OOLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 19–28) is not yet reported. A previous opinion of the Court of Appeals is reported at 280 F. 2d 493. The opinion of the District Court (App. 30–35) [1] is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1961 (Pet. App. 28). A petition for a rehearing was denied on December 18, 1961. The petition for a writ of certiorari was filed on Jan-

[1] "App." refers to the appellant's appendix in the court of appeals.

uary 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a mail fraud prosecution the trial court properly denied petitioners' motion for a new trial on the ground of newly discovered evidence, where a government witness in a later similar trial in another jurisdiction gave testimony in conflict with her testimony in the first trial on immaterial issues.

STATEMENT

Petitioners Garrison and Ooley were convicted of mail fraud and conspiracy in the Eastern District of Wisconsin. Each petitioner was fined $5,000 on Count 1 and given concurrent sentences of imprisonment for three years on each of the remaining ten substantive counts. On appeal, the convictions were affirmed. *United States* v. *Garrison*, 280 F. 2d 493 (C.A. 7).

The general nature of the scheme to defraud is set out in footnote 1 of the Court of Appeals' opinion of October 31, 1961 (Pet. App. 20–23). The scheme involved placing newspaper advertisements in Wisconsin newspapers circulating through the United States mail for the sale of vending machines for Gillette Blue Blades. Petitioners made false representations to the defrauded parties, who responded by mail, that petitioners' company, Bell Merchandising Automatically, Inc., had a B–1 Dun and Bradstreet rating, that it was backed financially by the Gillette Company, and that the company would repurchase the

machines if the purchasers became dissatisfied as to the income from them.

Thereafter, on September 19, 1960, petitioners, with six other defendants, were tried for a similar mail fraud in the United States District Court for the Eastern District of Missouri at St. Louis, Missouri. One of the companies named in the later indictment was the Silver King Distributing Company which also handled Gillette vending machines, and by which petitioners had been employed prior to forming their own company, Bell Merchandising, involved in the Wisconsin trial (App. 2). On the basis of testimony of a government witness, Mrs. Snelson, who testified at both trials, petitioners filed a motion for a new trial in the Wisconsin case on the grounds of newly discovered evidence (App. 22-30). The pertinent facts may be summarized as follows:

1. *The Wisconsin trial.*—At the trial in Wisconsin, Mrs. Snelson testified that she was employed by Bell Merchandising in St. Louis during April and May 1956 and worked for petitioners Garrison and Ooley. She did general office work, mailed advertisements to newspapers, and did some typing (App. 3). Before going to work for Bell Merchandising, she had worked as a secretary for Silver King Distributing Company in St. Louis where petitioners were salesmen (App. 4). The following is part of Mrs. Snelson's testimony (App. 5-6):

> Q. And who was it you worked for at Silver King?
>
> A. Pete Krane.
>
> Q. Anybody else?

A. Yes, I worked under one of the others—I was working for one of the others at all times.

Q. Was it their company, those two that had——

A. I don't know Jack DeWees.

Q. Were they your bosses?

A. Yes.

* * * * *

Q. All right. Now, in so far as the Defendants' Exhibit 57 is concerned, when Mr. Garrison or Mr. Ooley were salesmen for Silver King Distributing Company, did they have one of these sales kits—or whatever they call them—or sales brochures?

* * * * *

A. Yes.

Q. And when they started for themselves it was substantially the same type of sales material, sales kit; isn't that right?

A. Yes.

Q. Now, in so far as the pitch or sales talk, when they were working for Silver King they had a sales pitch or sales talk that was given to them by the owners of Silver King; isn't that right?

A. No, sir.

Q. You say they were not given a sales pitch, or that you don't know about it?

A. I have never known a salesman to get a sales pitch from Silver King.

Q. I see.

A. They—I——

Q. Did the salesmen have a sales pitch there at Silver King?

A. I was told they did.

Q. You were told they did. I see. But you did not prepare it?

A. No, I did not.

Q. They had it, but you did not prepare it?

A. No.

Mrs. Snelson testified that, when she was working at Silver King, Pete Krane and Jack DeWees were also working there as salesmen (Gov. App. 102).[2] Petitioner Garrison testified that he worked for Krane and DeWees at Silver King (Gov. App. 102–103). Petitioner Ooley testified that he also worked for DeWees at Silver King, and that Mrs. Snelson typed out a sales pitch for the salesmen there (Gov. App. 103–104).

2. *The Missouri trial.*—Mrs. Snelson testified that she had been employed at Silver King; that DeWees had hired her; and that she had typed six copies of a sales pitch (Gov. Ex. 299) and given them to Silver King salesmen (App. 7). On cross-examination, parts of Mrs. Snelson's testimony at the Wisconsin trial were read to her. She admitted giving testimony that she had not prepared a sales piten at Silver King (App. 11–12), but stated that she thought the questions related to Bell Merchandising, not to Silver King (App. 14). She stated that she did not recall her answer that she did not know Jack DeWees (App. 13). The trial court sustained a defense motion for a mistrial by reason of the conflict between her testimony as to the above items in the Wisconsin and Missouri cases (App. 16–21). A citation was

[2] "Gov. App." refers to the appendix of the government in the court of appeals.

issued for Mrs. Snelson to show cause why she should not be found in contempt of court (App. 21–22).

3. *The rulings on the motion for a new trial.*—Petitioners filed a motion for a new trial in the Wisconsin case on the ground of newly discovered evidence as a result of Mrs. Snelson's contradictory testimony given at the Missouri trial (App. 22–30). The trial court was of the opinion that the allegedly false testimony related to minor details having no materiality to the essential elements of the charges in the indictment, *i.e.*, the use of the mails and the intent to defraud (App. 30–35). In affirming, the court of appeals held that the district court had not abused its discretion in denying the motion for a new trial (Pet. App. 27).

ARGUMENT

The district court properly denied petitioner's motion for a new trial on the ground of newly discovered evidence.[1] Even when such a motion is based upon an allegation that a prosecution witness gave false or incorrect testimony, the motion should be denied unless it is shown that without the false testimony the jury might have reached a different result. The

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[1] *Larrison* v. *United States*, 24 F. 2d 82, 87 (C.A. 7); *United States* v. *Johnson*, 142 F. 2d 588, 591 (C.A. 7), petition for certiorari dismissed, 323 U.S. 806; *United States* v. *Johnson*, 149 F. 2d 31, 44 (C.A. 7), reversed on other grounds, 327 U.S. 106; *Gordon* v. *United States*, 178 F. 2d 896, 900 (C.A. 6), certiorari denied, 339 U.S. 935.

This Court's recent decision in *Mitchell* v. *United States*, No. 448 Misc., decided January 22, 1962, did not go into or change the existing requirements for a motion for a new trial.

courts below properly held that the portion of Mrs. Snelson's testimony alleged to be false was of no importance to the issues being litigated.

As the district court pointed out (App. 32), Mrs. Snelson's testimony in the Wisconsin trial that she did not know DeWees was given as an unresponsive answer to an incomplete question (App. 5) and later testimony showed that she knew him as one of the salesmen at Silver King (Gov. App. 102). As to her testimony that she did not prepare a sales pitch at Silver King and had never known a salesman to get a sales pitch from Silver King, it was, as the court pointed out, amplified by her testimony that she was told that the Silver King salesmen had a sales pitch (App. 6). Furthermore, the existence of a sales pitch at Silver King had little materiality to the question of whether petitioners committed fraud in their own business, through Bell Merchandising. There was direct evidence that petitioners caused advertisements for sale of the vending machines to be placed in newspapers; that within a few days thereafter the ten persons defrauded responded by letter to the post office box listed; that petitioners visited the parties defrauded and made oral misrepresentations to them; and that, after signing a contract and paying part of the contract price, each party received a letter in the mail confirming the contract and the payment made. Moreover, whatever Silver King's sales talk was, it would not excuse the clearly fraudulent representations as to Bell's financial standing which were proved at the trial (ft. 1, Pet. App. 21–22).

None of the cases relied upon by petitioner involves testimony as immaterial as that in this case. None is applicable to the factual evaluation involved in the district court's ruling in this case.

CONCLUSION

The decision below is a proper application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1962.